herself considered it as rubber land, in spite of the house thereon, when she filed her estate duty affidavit in 1948. Had it been as valuable in 1956 as the respondents contended (remembering that they had made no attempt to support their contention by producing any valuation thereof at the trial) one should have thought that Oh Hiam herself could not have been oblivious of such a valuable piece of property, which by itself should have readily fetched a price more than sufficient to pay for her trip to the hospital in Australia. In any event, event if she made a mistake, which I doubt, it was not such a fundamental mistake as to entitle the respondents to relief. As long ago as 1847, an English Court in *Okill* v. *Whittaker* [1] decided that, under somewhat similar circumstances, a conveyance should be upheld. In that case, premises were sold for the residue of a term, of which both parties at the time supposed that 8 years only were unexpired, and the price was fixed accordingly, but it afterwards appeared that 20 years were in fact unexpired at the time of the sale. Upon the vendor seeking to make the purchaser a trustee of the term for the additional 12 years, Lord Cottenham L.C., dismissing the bill, said:—

"Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres', and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

With respect, I would apply the same reasoning to this case. I do not think that what essentially was a mistake, due entirely to the fault of the vendor herself, should serve as a ground sufficient in law to deprive the blameless purchaser of a bargain. The maxim, *caveat emptor* is not wholly one-sided.

It was urged, on behalf of the respondents, that they were induced by a mistake on the part of their mother, the administratrix, to consent to the order of sale, and that a consent given under a mistake was no consent at all; consequently the order given as regards this particular piece of land should be set aside. The other 34 acres had already been resold; hence, admittedly, the order cannot be set aside concerning these six lots. For my own part, I am far from satisfied as to the merits of this argument. The mistake, if at all it was one, was not a fundamental mistake. The respondents were all adults. If they chose to give their consent blindly, and none of them claimed to have made any enquiries before doing so, they had only themselves to blame. I do not think there is any equity in their favour under the circumstances.

I would accordingly allow this appeal and set aside the order of the court below, with costs in both courts to the appellant.

Appeal allowed.

Solicitors: *Oorjitham & Lam; Skrine & Co.*

HOW PAIK TOO v. MOHIDEEN

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 40 of 1967]

Landlord and Tenant — Recovery of possession — Rent-in arrears — Control of Rent Ordinance, 1956, s. 12(1)(a).

Practice and Procedure — Appeal — New point taken on appeal for first time — Principle on which an appellate court will deal with such new point.

The landlord succeeded in his claim for possession against his tenant on ground of rent being in arrears 14 days or upwards after notice of demand. The tenant appealed on the ground that no demand for rent had been made by the landlord on the premises and that demand on the premises was necessary before rents could be lawfully due. This point was not pleaded in the defence. As no finding on this issue was made by the trial magistrate the judge on appeal ordered a retrial of this issue. Against this order of retrial the landlord appealed.

Held: (1) the point raised on appeal that no demand was made on the premises was not a fact in issue raised by the pleadings at the trial before the magistrate;

(2) the defendant should not have been heard on the new ground raised for the first time on appeal.

Cases referred to:—

(1) *The "Tasmania"* (1890), 15 App. Cas. 223, 225.

(2) *Page* v. *Bowdler* (1894), 10 L.T.R. 423.

(3) *Leong Hoi Kow* v. *Chan Ho Yat* [1951] M.L.J. 63.

FEDERAL COURT.

Peh Swee Chin for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Ipoh, allowing the appeal against the judgment of the magistrate's court at Tapah and ordering a retrial on the ground that the learned trial judge had failed to come to a finding of fact on the issue of demand.

It is necessary to refer to some facts of the case.

The appellant, whom I will refer to as the landlord brought this action against the respondent, whom I will refer to as the tenant, for possession of certain premises on the ground that the rent lawfully due had been in arrear for 14 days or upwards.

The defence whilst admitting that the said rents were in arrear alleged that this was done at the request of the landlord himself who stated that this method of payment would be more con-

venient for him, the landlord.

The learned magistrate found as a fact that the tenancy has always been a monthly tenancy, that rent was payable in advance and that the rent lawfully due has been in arrear for 14 days or upwards at the time the notice to quit was served on the tenant. He therefore gave judgment in favour of the landlord.

The appeal before the High Court was confined to one ground only namely that no demand for the rent in arrear had been made by the landlord and he was therefore precluded from relying on the proposition that rent was at the material date in arrears.

The High Court in reference to this ground stated in its judgment as follows:—

"There is some evidence of a sort on the record that the landlord sent his brother to ask for the rent every month. Such evidence is too vague and has to be balanced against the claim of the landlord in his solicitor's notice to quit dated 26th April, 1966 that 'the rent was payable without demand in advance.'

In the absence of any demand on the premises, or evidence of any demand, the landlord cannot succeed.

I, therefore, allowed the appeal and having regard to the failure of the learned trial magistrate to come to any finding of fact on the issue of demand, I ordered a re-trial."

In my opinion two questions have to be answered in this matter. First, should the High Court in exercise of its appellate discretion allow the new point which was not pleaded nor argued before the trial magistrate to be raised before it. And secondly, should it order a new trial in order that the new point may be raised and argued and further evidence be produced?

On this question of a new point before an appellate court I would quote a passage from the judgment of the court in *The "Tasmania"* [1] which is as follows:—

". . . . a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; . . . ."

It would be apparent that the learned appellate judge in the present case found that there was insufficient evidence upon which he could make a decision. In my view therefore he, in the proper exercise of his discretion, should not have allowed the new point to be argued.

In reference to the second question, it is my view that the High Court in the circumstances should not have directed a new trial in order to enable the new point to be raised. As Charles J. in *Page* v. *Bowdler* [2] stated:—

"The appeal, therefore, fails, and we do not think that we ought to direct a new trial on points not taken at the trial. The arguments addressed to us might have been addressed to the judge, but that was not done, and it would not be right to send the case to a new trial."

In the circumstances I would, therefore, allow the appeal and direct that the judgment of the learned magistrate be restored.

Ong Hock Thye F.J.: This is an appeal against the decision of Chang Min Tat J. in the High Court at Ipoh, allowing an appeal from the judgment of the magistrate at Tapah, whereby the plaintiff landlord was granted an order for repossession of rent-controlled premises against his tenant, the defendant.

In the magistrate's court the plaintiff (who is now appellant) had succeeded in his claim, under section 12(1)(a) of the Control of Rent Ordinance, 1956, on the ground that rent lawfully due had been in arrear for fourteen days or upwards.

"It was common ground", as the judge himself put it, "that the rents for certain months were, in point of fact, in arrears." The defence pleaded that it had been accepted practice between the parties for rent to be paid in arrears "once in every two, three, four or five months" and that this practice arose at the request of the plaintiff himself.

No other defence was raised, except a denial that rent was payable monthly in advance as alleged. This point, however, was wholly irrelevant because, even if payable in arrear as contended, rents for the months of February and March 1966, at all events, were in arrear for more than fourteen days when notice by the plaintiff was given on April 26, 1966 determining the defendant's tenancy.

The appeal to the High Court was, to quote the judge again, "confined to one ground only, that the rents, though in arrears, were not lawfully due until and unless a demand for the rents in arrears had been made on the premises." Whatever these words may mean — and if rents are not lawfully due, they of course cannot be in arrears — the point of fact raised on appeal was that no demand for rent had been made by the landlord on the premises of the tenant.

The learned judge took the view that the evidence of such demand was "too vague"; that "in the absence of any demand on the premises, or evidence of any demand, the landlord, cannot succeed;" that the learned magistrate having failed to make any finding of fact on this point, a retrial should be ordered, and he made the order accordingly.

With respect, I think the decision of the learned judge was wrong. In the first place, the point was never pleaded in the defence; consequently it was not a fact in issue requiring the magistrate to make any finding thereon. In the second place, notwithstanding that it was not a fact in issue, the plaintiff did testify thus: "Every month I send my younger brother to defendant's shop to ask for rent." This was a

categorical statement that demand for rent was made monthly at the premises. It was not challenged in cross-examination, hence dispensing with the brother being called to prove a fact which the defendant had made no attempt to deny.

In the third place, the defendant should not have been heard on the new ground raised for the first time on appeal. As Lord Herschell said in *The "Tasmania"*:—[1]

"I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

It is not at all surprising that this new ground was the only one raised by counsel at the appeal, because on no other ground could the judgment of the learned magistrate have been attacked. Indeed, I am sure that counsel was well aware that a similar defence had failed in *Leong Hoi Kow* v. *Chan Ho Yat*.[3]

I would therefore allow this appeal and affirm the order of the magistrate, with costs here and in the courts below.

Barakbah L.P. concurred.

Appeal allowed.

Solicitors: *Peh Swee Chin; Dharmananda & Co.*

NG HOI CHEU & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) August 16, 1967]

[Penang — Criminal Appeal No. 37 of 1967]

Criminal Law and Procedure — Appeal — Finding of fact — Credibility of witnesses.

Evidence — Statement from the dock — Addressing court — Failure to afford accused or his counsel opportunity of — Irregularity — Criminal Procedure Code (S.S. Cap. 21), s. 448.

When there is an appeal against a finding of fact, depending on the credibility of the witnesses, and no reason being advanced that such finding was wrong having regard to the evidence, the appellate court would have no hesitation in dismissing the appeal.

A statement from the dock is evidence, for what it is worth but nevertheless evidence which thereafter entitles the accused or his counsel to address the court. Failure to afford accused or his counsel an opportunity to address the court is a serious irregularity entitling the accused to a retrial. The irregularity is, however, curable under section 448 of the Criminal Procedure Code (S.S. Cap. 21) where counsel for the defence had previously made an address to the court in the same case and if he had not been shut out, he would have quite clearly merely repeated his address. There being no failure of justice having been occasioned in this case the appeal was dismissed.

Wong Heng Fatt v. *Public Prosecutor* [1] dissented from.

Cases referred to:—

(1) *Wong Heng Fatt* v. *Public Prosecutor* [1959] M.L.J. 20.

(2) *Lam Heng* v. *R.* [1937] M.L.J. 154.

(3) *Mahinder Singh* v. *Public Prosecutor* [1941] M.L.J. 230.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the appellant.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The appellants were in the sessions court at Penang charged with the following two charges:—

"First Charge:

You are jointly charged that you on 8.12.65 at about 8.50 p.m. in the sea off Pulau Kendi, Penang were knowingly concerned in conveying dutiable goods, to wit, 11 bundles textiles in an un-numbered motorised sampan with intent to defraud Government of the duties thereon amounting to $1 340.40 thereby committing an offence under section 131(1)(e) of the Customs Ordinance 42/52 and punishable under section 131(1) of the same.

Second Charge:

You are jointly charged that you on 8.12.65 at about 8.50 p.m. in the sea off Pulau Kendi did carry in a local craft, to wit, an un-numbered motorised sampan goods of a class dutiable on import, otherwise than with the permission of the Comptroller General, contrary to section 47(1) and punishable under section 134 of the Customs Ordinance 42/52."

At the close of the case for the prosecution and after submission by counsel for the appellants and by the prosecuting officer, they were acquitted and discharged on the 1st charge but were called upon to make their defence to the second charge. Thereupon, on the advice, as stated by them, of their counsel, they pleaded guilty to the 2nd charge. They were convicted and fined.

Their acquittal on the 1st charge was set aside by Ong Hock Sim J. and the case was remitted to the president, sessions court for him to call upon the defence.

The facts were few. The appellants were on the night in question found in an un-numbered motorised sampan conveying 11 bundles of textiles off Pulau Kendi between the Island of Penang and the mainland which is the principal customs area. It is alleged by the customs officer that the sampan was headed towards the